82-1357

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term

UNITED STATES OF AMERICA
Appellee

vs.

THOMAS BRATTON
Appellant

On Petition for Writ of Certiorari from the
Sixth Circuit Court of Appeals No: 82-5015

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES RULE 803(17) OF THE FEDERAL RULES OF EVIDENCE AUTHORIZE INTRODUCTION OF EXPERT OPINION IN A CRIMINAL TRIAL THROUGH THE HEARSAY TESTIMONY OF A LAY WITNESS SUMMARIZING INFORMATION FROM AN EXTRAJUDICIAL WRITING COMPILED BY A SINGLE INDIVIDUAL?

A LIST OF PARTIES TO PROCEEDINGS

THOMAS BRATTON, Appellant.

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UNITED STATES OF AMERICA, Appellee, represented by W. Hickman Ewing, United States Attorney, Western District of Tennessee, 1026 Federal Office Building, Memphis, Tennessee 38103.

SOLICITOR GENERAL FOR THE UNITED STATES, Department of Justice, Washington, D.C.

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REFERENCE TO UNOFFICIAL REPORT OF OPINION BELOW

The defendant's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit in Case No: 82-5015 by Opinion entered by Order of the Court filed December 21, 1982, and incorporated in the Appendix to the Petition for Writ of Certicrari.

STATEMENT OF JURISDICTION

On December 21, 1982, the United States Court of Appeals for the Sixth Circuit entered an Order affirming the conviction of Thomas Bratton in the District Court for the Western District of Tennessee, Eastern Section, on three counts of using the mail in a scheme to defraud in violation of 18 U.S.C., §§ 1431 and 2. The appellant seeks by Writ of Certiorari review in the Supreme Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment 6

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18 United States Code, 2

"Whoever commits an offense against the United States, or aides, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Whoever wilfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Title 18 United States Code, 1431

"Whoever having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice, or attempting so to do, places in any Post Office or

authorized depository for mail any matter or thing whatever to be sent or delivered by the Post Office shall be guilty of an offense against the laws of the United States."

Federal Rules of Evidence, Rule 702

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Federal Rules of Evidence, Rule 703

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Federal Rules of Evidence, Rule 803(17)

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or

other published compilations, generally used and relied upon by the public or by persons in particular occupations."

STATEMENT OF THE CASE

Thomas Bratton was indicted by the Grand Jury for the Western District of Tennessee, Eastern Division, on five counts of using the mail in a scheme to defraud in violation of 18 U.S.C. §§ 1431 and 2. Counts One, Two and Three charged the defendant with accepting cash payments from James Sidney Rose, d/b/a Mistco Supply Company in exchange for placing orders for merchandise. The indictment charged that the mails were used by the defendant in furtherance of this scheme on or about October 8, 1976, on or about December 10, 1976, and on or about April 7, 1978. Counts Four and Five of the indictment charge the defendant with accepting cash payments from David Doster, sales representative for Mid-South Materials, Inc., in exchange for placing orders for merchandise.

The defendant entered a plea of not guilty to each count of the indictment and evidence was presented to a jury over a three day trial.

In support of Counts 1, 2, and 3 the Government presented testimony of James Sidney Rose and George Stoker, the owner of Withers and Wellford, the petroleum distributor from whom Rose ordered products. Rose testified that he began having dealings in 1970 and 1971 with Mr. Thomas Bratton, Supervisor of the Henry County Road Board. He testified he paid Mr. Bratton Sixty-Five Dollars ($65.00) cash for each drum which Bratton pur-

chased. He testified that somewhere around 1974 he started paying Mr. Bratton One Hundred Dollars ($100.00) per drum per purchase. Rose continued to sell to Mr. Bratton until, "somewhere around 1976, 1977, or 1978." He testified that on three occasions set forth in the indictment he had taken an order for petroleum products from Mr. Bratton for which he received payment by mail. On each occasion, Rose testified, he paid Mr. Bratton One Hundred Dollars ($100.00) in connection with the purchase.

Rose was unable to testify from his own records which he had destroyed in an effort to evade the law; he did not testify from memory but from invoices and warrants provided him.

Rose had direct recollection neither of paying Mr. Bratton any money in October, 1976, or April, 1978 nor of any specific time, date, month, or place where he paid Thomas Bratton money.

Rose had no recollection of the name of the advertising company which he had operated for seven or eight years prior to establishing Mistco Supply Company.

Rose's testimony was procured by plea agreement. He entered a plea of guilty in the Eastern District of Arkansas in January, 1980, to mail fraud for which the maximum penalty was twenty-five (25) years. In return for his testimony as to business in Tennessee he was sentenced to fifteen (15) months, serving one hundred (100) days at Maxwell Air Force Base and spending the remaining time at a halfway house in Jackson, Tennessee.

In corroboration of Rose's testimony the Government offered proof by various distributors of petroleum products that their products were available at a lower cost than that paid by Bratton. The Government attempted to prove that these less expensive products were the same as those purchased by Bratton through the testimony of George Stoker.

Mr. Stoker had been in the lubricant distribution business since 1971. Before that time he was a branch manager for the Snap-on Tools Corporation. Mr. Stoker testified directly from a chart which was not introduced into evidence that certain brands of lubricants were interchangeable with others which were later shown to be available to Mr. Bratton at a lower price than that paid to Rose.

Based on this testimony, the prosecuting attorney argued to the jury that the defendant was purchasing products from Rose when he knew identical products were available at substantially lower prices. Proof, the prosecuting attorney argued, that the defendant was taking cash payments in exchange for the purchase.

Testifying on his own behalf, Mr. Bratton denied Mr. Rose ever gave him any money. He testified that the fuel ordered from Rose was represented as a superior product to others available.

On cross-examination the prosecuting attorney argued at length with Mr. Bratton as to whether the fuel ordered from Mr. Rose was interchangeable with other less expensive products, holding out the testimony of George Stoker that products were interchangeable as expert testimony.

In support of Counts 4 and 5 the Government presented the testimony of David Doster that he had made cash payments to the defendant in exchange for the defendant's purchase of building materials. Unsupported by corroborating evidence of comparable prices for these products, Doster's testimony was rejected by the jury.

On Monday, October 19, 1981, the jury returned a verdict finding the defendant guilty of the charges set forth in Counts 1, 2, and 3 of the indictment and not guilty of the charges set forth in Counts 4 and 5 of the indictment.

On December 11, 1981, the defendant was sentenced to imprisonment of one (1) year and one (1) day as to each count, to run concurrently, and a Five Hundred Dollar ($500.00) fine for each count, making a total fine of Fifteen Hundred Dollars ($1500.00), to be paid after the sentence is completed.

The defendant filed a timely Notice of Appeal which was docketed in the Sixth Circuit Court as No: 82-5015. The Sixth Circuit Court of Appeals affirmed the conviction by Order of December 21, 1982. A Motion to Stay the Mandate was granted on January 14, 1983.

ARGUMENT

The theory of the Government in this prosecution was that Thomas Bratton purchased petroleum products from James Sidney Rose at inflated prices because he received a cash payment from Rose for each purchase. Critical to the Government's case as set forth by the prosecuting attorney is the corroborating proof " . . . that some product, or a product like that, similar to or interchangeable with, if you will, could have been purchased for about one-fifth or one-sixth of the price that was being charged."

The Government presented this proof through the testimony of George Stoker. Mr. Stoker was identified as the owner of Withers & Wellford, a distributor of petroleum products. Mr. Stoker was asked:

> "Now, do you have a chart that will tell us, if I ask you about certain items, or can you tell me from your experience if a certain item is

a comparable, that is interchangeable, item with your diesel stabilizer."

Without further proof of his experience or of the source of the chart, Mr. Stoker testified over the objection of counsel that certain brands of lubricants were interchangeable with the diesel stabilizer purchased by Thomas Bratton from James Sidney Rose. The Trial Court admitted the testimony, finding the chart from which Mr. Stoker testified to be relied upon in the industry.

The Court of Appeals for the Sixth Circuit concluded that the testimony of the witness was admissible because the publication from which he testified was admissible under Rule 803(17) of the Federal Rules of Evidence. Rule 803(17) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (17) Market reports, commercial publications, market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The chart whence information was read into evidence by Mr. Stoker as it was presented by the Government is not the type of publication which the exception embraces. The notes of the Advisory Committee on Proposed Rules state:

> "Ample authority at common law supported the admission into evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc. prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include

> other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate."

The necessity for admitting hearsay evidence described in 803(17) is set forth in **Weinstein's Evidence** quoting from a 1961 Iowa Law Review article:

> "If this evidence is to be obtained it must come from the compilation, since the task of finding and summoning every person who has a hand in making the report or list would be almost impossible."

4 **Weinstein,** § 803(17) (1) at 803-246 (1981), citing Note, "Commercial Lists," 46 Iowa L. Rev. 455 (1961).

The nature of the publications which the exception embraces is clear from these comments: information **from multiple sources** compiled in a list for reference and relied on by the public or persons in particular occupations.

As Weinstein points out, not every publication relied on by the public or persons in particular occupations should be included in this exception. There is not a question of the trustworthiness of publications which compile readily ascertained facts; denying a party cross-examination of the compiler or the persons who supplied the data is not critical. However, other publications such as the chart presented in the instant case are not concerned with objective facts and may contain statements of opinion; the opportunity to cross-examine the person or persons who composed it may establish that he "changed his mind, or that

new developments have rendered their conclusions obsolete, or that they were not considering the particular facts now presented when drafting their manual." See 4 **Weinstein,** § 803(17) (01) at pages 803-246 and 803-248 (1981).

In the instant case the chart from which Mr. Stoker testified was not, in the first instance, admitted into evidence for the jury to rely upon. Instead, Mr. Stoker was called upon to testify whether from this chart or from his experience he knew that certain items were **interchangeable.** Testimony from the extrajudicial writing was not a summary of ascertained facts gleaned from multiple sources. The testimony from the extrajudicial writing set forth one man's opinion that certain lubricants were "interchangeable."

The hearsay exception may not apply to deny a defendant in a criminal case the right to cross-examine and to confront a single witness whose expert opinion as to what products are "interchangeable."

The two reported cases apparently upholding admissibility of documents under Rule 803(17) concern lists of ascertainable facts. In **United States v. Grossman,** 614 F.2d 295 (1st Cir. 1980), a catalog was admitted under Rule 803(17) as a compilation of retail prices, the Court noting that it was also admissible under 803(6). Likewise the Circuit Court for the Eighth Circuit upheld admission into evidence of a pricing index to measure fair market value in a suit for damages; Rule 803(17) would apply to this case. **Fraser-Smith Co. v. Chicago, Rock Island and Pacific Railway Co.,** 435 F.2d 1396 (8th Cir. 1971).

The chart which Mr. Stoker summarized did not merely list facts compiled from multiple sources. Admitting the testimony deprived the defendant of the opportunity to cross-examine the person com-

posing the chart as to the technical information and the defendant could not cross-examine the individual composing the chart to determine what facts he considered in determining that products were interchangeable. Particularly in a criminal trial should the courts closely scrutinize the admission of hearsay evidence.

The testimony was not admissible under any other exception set forth in the Rules of Evidence.

The Government failed to qualify the witness as an expert. Even if he had been qualified, the use of the witness to disguise admissibility of hearsay evidence violates the Rules of Evidence and the defendant's right of confrontation.

Rule 702 of the Federal Rules of Evidence provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

In the instant case no evidence was offered of Mr. Stoker's knowledge, skill, experience, training or education as to properties of lubricants which he testified were interchangeable. Mr. Stoker testified that he was in business selling lubricants. He himself admitted he had no knowledge of the facts considered to determine products were "interchangeable," or of the qualifications of the individual who composed the chart from which he testified.

The qualification of the witness fell short of the standard required of an expert:

> "The principle to be distilled from the cases is plain: if experience or training enables a

> proferred expert witness to form an opinion which would aid the jury, in the absence of some countervailing situation, his testimony will be received. **Jenkins v. U.S.**, 307 F.2d 637, 644 (D.C. Cir. 1962).

See also, **Mannino v. International Manufacturing Company,** 650 F.2d 846 (6th Cir. 1981).

The Court must scrutinize more closely the admission of expert testimony in a criminal case. Although the clear trend in federal courts is toward the admission of expert testimony when it will aid the trier of fact under Rule 702, "However, a strong countervailing restraint on the admission of expert testimony is the defendant's right to a fair trial." **United States v. Brown,** 557 F.2d 541 (6th Cir. 1977).

The Court must search the record to determine that the expert has been qualified and a proper foundation laid:

> "In recognition of the inherent danger that expert testimony admitted without proper foundation may tend to confuse or mislead the trier of fact and thus defeat a defendant's right to fair trial, in **United States v. Green,** 548 F.2d at 268, we adopted the four criteria for reviewing a district court's decision to admit expert testimony set down in **United States v. Amaral,** 488 F.2d at 1152. Four factors must appear in the record to uphold the admission of expert testimony:
> (1) Qualified experts;
> (2) Proper subject;
> (3) A conformity to a generally accepted explanatory theory; and
> (4) Probative value as compared to prejudicial effect."
> **United States v. Brown, supra,** at 556.

In the instant case the record is void of any qualification of George Stoker to offer testimony that the qualities of different lubricants make them "interchangeable."

If George Stoker were qualified as an expert then he would be permitted to testify in accordance with Rule 703 of the Federal Rules of Evidence:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The most controversial aspect of Rule 703 is the second sentence authorizing an expert to base an opinion upon non-admissible data if he as an expert would reasonably rely upon such data in reaching conclusions in his field. See, 3 **Weinstein's Evidence,** paragraph 703(02). However, prior to permitting the expert to testify on the basis of facts not admissible into evidence the court must find pursuant to Rule 104(a) that the underlying data is of a kind that is reasonably relied upon by an expert in a particular field in reaching his conclusions. However, as **Weinstein** points out, a judge should not allow an opinion if the expert can show only that **he** customarily relies upon such material. Therefore, in **Zenith Radio Corporation v. Matsushita Electric Industrial Company, Limited,** 505 F.Sup. 1313 (Eastern District Penn. 1981) the trial court used a balancing test:

> "...it is plain that the 'reasonable reliance' requirement of Federal Rules of Evidence 703 grew from and is cognate with

> the requirement that information admitted as an exception to the hearsay rule have some circumstantial degree of reliability or truthworthiness element." **Zenith Radio Corporation v. Matsushita, supra,** at 1324.

Likewise, in **Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.** 632 F.2d 1135 (4th Cir. 1980) the Fourth Circuit Court of Appeals upheld the exclusion of testimony by an expert when no showing was made that the underlying data relied upon by the expert about local values was of a type reasonably relied upon by **other experts in the field.**

In the instant case George Stoker testified that he relied upon the chart which was used by distributors but no additional proof was adduced to qualify the chart as one used by experts in the field of lubricants.

The appellant objected to the admission into evidence of George Stoker's testimony from a chart taken from a magazine "Plant Engineering." The Trial Court overruled the objection, "if it (the chart) is relied upon by the industry."

Rule 703 of the Federal Rules of Evidence permits an expert to base his opinion or inference on evidence outside the record, "If or a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The rationale behind this rule is set forth by the Fifth Circuit Court of Appeals sitting **en banc** in **United States v. Williams,** 447 F.2d 1285 (5th Cir. 1971) as follows:

> "The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the liability of the record and statements upon

> which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and a lifetime of experience. Thus, when the expert witness has consulted **numerous sources and used that information,** together **with his own professional knowledge** and experience, **to arrive at his opinion,** that opinion is regarded as evidence in its own right and not as hearsay in disguise." (emphasis added)

However, where an individual merely summarizes data or opinions of a third party without intercepting them in accordance with his own expertise, the summary constitutes hearsay inadmissible under Rule 703.

In **Jenkins v. U.S.,** 307 F.2d 637 (D.C. Cir. 1962), a leading case decided prior to the adoption to the Federal Rules of Evidence, the Court reviewed the admission into evidence of a psychiatrist's diagnosis based both on his observations and on reports of examinations and tests administered by others, and the court found the opinion testimony based in part on reports of others which were not in evidence but on which the expert customarily relied upon to be valid:

> "... Dr. Schaengold's changed diagnosis did not rest **solely** on the later test reports which were not in evidence when he testified but also upon his own earlier examination." (emphasis added)

The footnote to the above sentence states: "Such reliance would amount to offering an opinion of another in violation of the hearsay rule."

In the instant case George Stoker testified directly from the reports of a single extrajudicial source without interpretation based upon his own experience.

Following the initial decision in **United States v. Williams,** 431 F.2d 344 (5th Cir. 1970) a petition for rehearing was filed and denied. The Court, upholding the admissibility of an expert's opinion based on evidence outside the record, stated:

> "If a witness has gone to only one hearsay source and seeks merely to summarize the content of that source, then he is acting as a summary witness, not an expert. Since he is introducing the content of the extrajudicial statements or writings to prove truth, his testimony, like its source, is hearsay and is inadmissible unless the source qualifies under an exception to the hearsay rule. When, however, the witness has gone to many sources—although some will all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that evidence is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise." **United States v. Williams,** 431 F.2d 1168, 1173 (5th Cir. 1970).

See also, **Weinstein's Evidence,** Volume 3, Paragraph 703(04).

In the instant case the chart from which George Stoker read was clearly hearsay in disguise, inadmissible under any exception to the hearsay rule.

Not only did the Government fail to satisfy the requirements of the Federal Rules of Evidence, but the defendant also was denied his Sixth Amend-

ment Right to confrontation by the admission into evidence of the out of court statement of the opinions of a magazine editor that the petroleum products were interchangeable.

The confrontation clause of the United States Constitution does not require exclusion of all hearsay evidence. Under **California v Green,** 399 U.S. 149 (1970) the Supreme Court permitted hearsay evidence where the declarant was present at trial and subject to effective cross-examination. However, **California v. Green,** indicates the confrontation rights may be impaired if the declarant cannot remember the statement because he then cannot be effectively cross-examined. Likewise, in **Dutton v. Evans,** 400 U.S. 74 (1970) a hearsay statement was held admissible and the confrontation clause satisfied despite the absence of the declarant so long as there were "indicia of reliability which had been widely viewed as determinative as to whether a statement may be placed before the jury though there is no confrontation of the declarant." **Dutton v. Evans, supra,** at 89. Likewise, there must be sufficient indicia of reliability to "afford the trier of fact a satisfactory basis for evaluating the truth of the trier's statement." **California v. Green, supra,** at 161.

In the instant case there is no basis for the reliability of the hearsay information admitted into evidence. The publication presented was not a compilation of readily ascertained facts contemplated under Rule 803(17).

Clearly, summary testimony is inadmissible as hearsay under Rule 703. Therefore, the admission into evidence of the testimony of a lay witness as to expert opinion based on an extrajudicial writing violates the Sixth Amendment guarantee of a right to confront witnesses. In a criminal trial, the admission into evidence of expert testimony must be

closely scrutinized because of the import of the defendant's right to a fair trial. **United States v. Brown, supra,** at 556.

In **United States v. Williams,** 447 F.2d 1285 (5th Cir. 1971), the admissibility of an expert witness was upheld under the Sixth Amendment where expert opinion as to value of property was admitted although the appraisal reports of the expert relied upon inadmissible information and data to ascertain the values. In the instant case the Government has not presented an expert witness whose opinion is based on investigation of documents, records, or tests not introduced. Nor is the extrajudicial writing a compilation of ascertained facts. The Government has introduced a witness who has read into the record the opinion of one other individual. Therefore, the defendant's right of confrontation has been infringed by the Government's introducing the report of an expert without calling the expert who prepared it. So stated the court in **United States v. Williams, supra,** at 1290:

> "Had the government attempted to introduce the appraisal reports in evidence without calling the expert who had prepared them and offering an opportunity for cross-examination, the Williams' right of confrontation would have been infringed but this is not the case at bar."

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing Petition for Writ of Certiorari to Mr. W. Ewing Hickman, U.S. Attorney, 1026 Federal Office Building, Memphis, Tennessee, 38103, and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 10th day of February, 1983.

Dale Quillen

Dale Quillen